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CHONG CHOI KEOW

v.

TENGKU REZA SHAH TENGKU CHAIDZIR SHAH

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HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT1) 22-826-2004]
10 MARCH 2009

C ***CONTRACT:*** *Agreement - Sale and purchase agreement - Whether proved to be a sham - Whether there was evidence execution of SPA procured by fraud - Whether there was distinct oral agreement to rescind or modify SPA - Whether SPA a valid and binding contract - Whether defendant constituted breach of SPA when he lodged a private caveat on*
D *property - Evidence Act 1950, s. 92*

The plaintiff and the defendant entered into a sale and purchase agreement (SPA) whereby the defendant agreed to sell and the plaintiff agreed to buy a piece of property ('the said property) at
E the purchase price of RM465,000. The plaintiff paid a sum of RM240,000 to the defendant upon the execution of the SPA and the balance of the purchase price in the sum of RM225,000 was payable within three months from the date of the SPA. To finance the purchase of the said property, the plaintiff obtained a loan
F facility from Public Bank Bhd for the sum of RM200,000. Subsequently, the defendant entered a private caveat on the said property. Consequently, the SPA could not be completed and the plaintiff initiated the present suit against the defendant. According to the defendant, he had been the managing director of a
G property developer company that was developing a 20 storey office block. The plaintiff was introducing foreign investors for his project which was facing financial difficulties. According to the defendant, the plaintiff had advanced him RM160,000 from the beginning of 1998 till August 1998 and that sometime in early
H September 1998 the plaintiff wanted the loan repaid on an urgent basis. He had informed the plaintiff about the said property and she suggested going through a sale and purchase agreement. She would take a bank loan so that she could receive the amount she advanced to the defendant and that the defendant would pay off
I the bank loan. The defendant submitted that it was not to be an outright sale and that he was to be the beneficial owner at all

times. The defendant also said that he was to get RM80,000 from the plaintiff to complete the reconstruction of the said property when the plaintiff got the loan. The defendant further submitted there was an understanding between the plaintiff and him that as soon as he had enough money he was to redeem the said property and the plaintiff was to transfer the said property back to him and the understanding was contained in the letter marked exh. D11. The defendant did not proceed with the SPA because the bank loan of RM200,000 would not be enough to redeem the said property and pay to him RM80,000. So he entered a private caveat on the said property. Taking the surrounding circumstances as a whole, the defendant submitted that the SPA was a sham. The issues to be determined were (i) whether there was any separate oral agreement between the plaintiff and the defendant on which the SPA was silent; (ii) if so, whether the collateral agreement related to any matter which was not inconsistent with the SPA; (iii) if not, whether the defendant committed any breach of the SPA.

Held (allowing plaintiff's claim):

(1) The defendant's allegations were clearly intended to contradict, vary and negate the terms and conditions of the SPA. The defendant had agreed that he signed the SPA and admitted that he received RM160,000 from the plaintiff. He also said that he understood the meaning of the phrase 'the receipt of which sum the vendor hereby acknowledges'. There was no evidence that the execution of the SPA was procured by fraud or that the SPA was induced by fraudulent misrepresentation. The defendant had admitted to signing the SPA voluntarily. Therefore, there was no question of the defendant signing the SPA under duress. The facts adduced by the defendant's evidence in this regard would not invalidate the SPA under proviso (a) to s. 92 of the Evidence Act 1950. (para 12)

(2) The defendant alleged that the plaintiff had granted him an option to buy back the said property at the same purchase price. That agreement was contained in the document exh. D11. The plaintiff did not deny issuing D11 to the defendant. The plaintiff said that it was signed after the SPA was executed. On its face D11 was a letter from the plaintiff to the defendant giving the defendant a buy-back option. It was created subsequent to the execution of the SPA. D11 was

A not an oral agreement. It was not and could not be said to be a separate oral agreement as to which the SPA was silent. The defendant's reliance on D11 to support his allegation of a separate oral agreement was of no avail. (para 13)

B **(3)** The parties have entered into the SPA. It was also the defendant's evidence that (i) the plaintiff suggested that they go through the SPA; (ii) the plaintiff would take a loan from a bank so she could receive the amount the plaintiff loaned to the defendant and (iii) the defendant would subsequently pay C off the bank loan. The defendant also said that he was to get RM80,000 from the plaintiff to complete the reconstruction of the said property. As soon as he had enough money he was to redeem the said property and the plaintiff was to transfer back the said property to him. There was, on the facts, no D condition precedent to be fulfilled before the SPA took effect. The RM80,000 payment, the redemption of the said property and the transfer back of the said property took effect after the execution of the SPA. In fact, the defendant's allegations hinged on the validity of the SPA and not otherwise. (para 14)

E **(4)** There was no evidence of any distinct subsequent oral agreement to rescind or modify the SPA. The defendant's allegations pertained to the arrangement that was agreed with the plaintiff prior to the execution of the SPA. There was F nothing to indicate that the facts in this case fell within any of the circumstances described in the provisos to s. 92. Accordingly, the defendant's evidence relating to the purported collateral agreement were inadmissible. (para 15)

(5) The SPA was not a sham agreement. The SPA was a valid G and binding contract for the sale and purchase of the said property. It was executed by both the plaintiff and the defendant. The defendant had acknowledged receipt of a sum of RM240,000 as deposit and part payment of the purchase price. The plaintiff applied for and obtained a housing loan of H RM200,000. However, the defendant lodged a private caveat on the said property thereby preventing the plaintiff from completing the SPA. The defendant's aforesaid act constituted a breach of the SPA on his part. (para 16)

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Case(s) referred to:
Gek Lau Choon Theatrical Company v. Hu Kiang Yan [1937] MLJ 222 ***(refd)***
Latham v. Credit Suisse First Boston [2000] SLR 693 ***(refd)***
Siah v. Tengku Nong [1964] MLJ 43 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the plaintiff - CL Liew (YK Tee with him); M/s SK Song & Co
For the defendant - KB Rajah; M/s KB Rajah & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The plaintiff's claim against the defendant is as follows:

(i) Specific performance of the sale and purchase agreement dated 2 October 1998 ('SPA') entered into between the plaintiff and the defendant;

(ii) Damages *in lieu* of specific performance including:

(a) RM240,000 being part-payment of purchase price paid by the plaintiff to the defendant under the SPA;

(b) RM24,000 being liquidated damages pursuant to the SPA;

(c) RM8,300 being stamp duty paid by the plaintiff;

(d) Interest at 8% per annum on RM272,300 calculated from 28 November 1998 until full settlement; and

(e) Costs.

Brief Account Of The Facts

[2] On 2 October 1998 the plaintiff and the defendant entered into the SPA whereby the defendant agreed to sell and the plaintiff agreed to buy a piece of property held under HS(D) 85680 PT/MLO 2307 in the mukim of Plentong together with a semi-detached house erected thereon known as No. 48A, Jalan

A Sultanah Rogayah, Taman Iskandar, 80050 Johor Bahru ('the said property') at the purchase price of RM465,000. The plaintiff paid a sum of RM240,000 to the defendant upon the execution of the SPA. The balance of the purchase price in the sum of RM225,000 was payable within three months from the date of the SPA with B an extension of 1 month subject to interest at the rate of 10% on the unpaid balance purchase price. To finance the purchase of the said property the plaintiff obtained a loan facility from Public Bank Bhd for the sum of RM200,000. On 28 November 1998 the defendant entered a private caveat on the said property. C Consequently, the SPA could not be completed and the plaintiff initiated the present suit against the defendant for the abovementioned relief.

Plaintiff's Case

D **[3]** The plaintiff testified in court that on 2 October 1998 she entered into the SPA (exh. P1) with the defendant for the purchase of the said property for a total purchase price of RM465,000. She said that she paid to the defendant a sum of E RM240,000 being deposit and part-payment towards the total purchase price. She said that the defendant acknowledged receipt of the said payment by signing the SPA. The plaintiff also said that she applied for a loan to finance the purchase of the said property. On 20 November 1998 Public Bank Bhd granted her a F housing loan of RM200,000 to finance the purchase of the said property *vide* a letter of offer dated 20 November 1998 (exh. P2). Public Bank Bhd did not release the loan to the defendant because of a private caveat lodged by the defendant on the said property on 28 November 1998. The Form 19B - application to G enter a private caveat signed by the defendant dated 28 November 1998 was identified and marked as exh. P3. A copy of a land search dated 7 August 2003 confirming the said private caveat was produced and marked exh. P4. The plaintiff also said that she obtained a court order (exh. P5) to remove the said private H caveat. Subsequently, the defendant applied to the court for an interim prohibitory injunction to prevent the transfer of the said property into the plaintiff's name. The defendant's application was dismissed. The order dismissing the defendant's application is marked exh. P6. The plaintiff also testified that she could not I complete the sale and purchase of the said property because the solicitor handling the transaction had absconded together with the

original memorandum of transfer. Further, the defendant refused to transfer the said property to her even though she is ready and willing to pay the balance purchase price. The plaintiff also paid the stamp duty for the transfer of the said property on 11 December 1998 as shown in the memorandum of transfer in exh. P7. According to the plaintiff Danaharta Urus Sdn Bhd had instituted foreclosure proceedings against the defendant but the defendant redeemed the said property on 8 July 2004. The redemption of the said property is reflected in a land search dated 9 September 2004 (P8). The plaintiff said that other than the SPA, she did not enter into any other agreement, oral or written with the defendant.

[4] In cross-examination it was put to the plaintiff that she advanced up to RM160,000 to the defendant between early 1998 to August 1998. The plaintiff agreed but said that the sum advanced was RM240,000. She denied that she requested the defendant to return the RM160,000 sometime in September 1998. She agreed that she suggested to the defendant to enter into the SPA and that she would be taking a bank loan to buy the said property. She denied the defence's suggestion that after taking the bank loan she would pay RM80,000 to the defendant to defray the costs of reconstruction. She also denied that under the SPA the beneficial ownership of the said property would remain with the defendant and that the defendant would pay the bank loan. She also denied that she agreed to transfer back the said property to the defendant after the bank loan had been paid back by the defendant. She denied any knowledge that the defendant had spent RM750,000 for the reconstruction of the said property. She denied the suggestion that the mode of payment of the SPA was unusual. She said that she did not have enough money to pay the full purchase price of RM465,000. She took a bank loan of RM200,000 and that she issued a cheque for the differential sum to the lawyer. She agreed that on 2 October 1998 no money was transacted. The plaintiff also denied that the SPA is a sham. The plaintiff also admitted that she signed a letter dated 2 October 1998 to the defendant granting the defendant the option to re-purchase the said property at RM465,000. She said that this letter was signed after the SPA and signed on the same day. In re-examination the plaintiff said that after signing the SPA the defendant asked her whether he could purchase back the said property if he had the money and she agreed. That was why she issued that letter. However, the defendant did not exercise the option.

A **Defendant's Case**

[5] According to the defendant's testimony in 1998 he was the managing director of a property developer company. The company was developing a 20 storey office block in Johor Bahru. The B plaintiff was introducing foreign investors for his project which was facing financial difficulties. The defendant said that the plaintiff advanced him RM160,000 from the beginning of 1998 till August 1998. Sometime in early September 1998 the plaintiff wanted the loan repaid on an urgent basis. He informed the plaintiff about the C said property and she suggested going through a sale and purchase agreement. She would take a bank loan so that she could receive the amount she advanced to the defendant and that the defendant would pay off the bank loan. The defendant said that it was not to be an outright sale and that he was to be the D beneficial owner at all times. The defendant also said that he was to get RM80,000 from the plaintiff to complete the reconstruction of the said property when the plaintiff got the loan. There was an understanding between the plaintiff and him that as soon as he had enough money he was to redeem the said property and the E plaintiff was to transfer the said property back to him. The understanding is contained in the letter dated 2 October 1998 marked exh. D11. The defendant did not proceed with the SPA because the bank loan of RM200,000 would not be enough to redeem the said property and pay to him RM80,000. So he F entered a private caveat on the said property. The defendant also said that his private caveat was subsequently removed by a court order. The defendant borrowed RM600,000 from one Yip Fook Chang @ Yip Ronald and redeemed the said property from Danaharta Harta Urus Sdn Bhd in March 2004. The defendant G transferred the said property to his wife sometime in August 2007. The defendant agreed that he owed the plaintiff RM160,000 which he is willing to repay in the same manner it was advanced to him.

H **[6]** In cross-examination the defendant said that he understands the contents of the SPA. He understands cl. 1 which refers to the payment made by the plaintiff as described in ss. 7 and 8 of the Schedule. He admitted that the amount stated in s. 7 is RM240,000. He also admitted that he understands the phrase in I clause 1 which reads 'the receipt of which sum the Vendor hereby acknowledges'. However, he denied acknowledging receipt of

RM240,000 and agreeing to sell the said property to the plaintiff. He said that he understands cl. 14 of the SPA which states that the defendant must, *inter alia*, refund all monies paid by the plaintiff in the event he fails to transfer the said property. The defendant agreed that in entering the private caveat he had prevented the plaintiff from completing the SPA and that cl. 14 shall apply. He also agreed that there is no mention in exh. D11 that he is to remain as the beneficial owner of the said property or that the sum of RM80,000 is to be paid to him. He denied that the so-called arrangements are a mere afterthought. He denied transferring the said property to his wife to defeat the purpose of the plaintiff's suit. In re-examination the defendant said that the SPA was a sham agreement. Exhibit D11 which was signed on the same day embodied some but not all of the terms of the agreement with the plaintiff. Sometime after the SPA was signed, the private arrangements were not performed so he lodged a caveat.

Defence's Submission

[7] Learned counsel for the defence submitted that the SPA was witnessed by a solicitor named Lim Jit Liang who is not available to give evidence. The initial payment is unusual in that it is not the usual 10% of the purchase price. It was also contended that the evidence that is most telling is the second agreement (D11) dated the same day as the SPA where the plaintiff agreed to resell the said property to the defendant at the same price. No time frame for the reselling is stated. Taking the surrounding circumstances as a whole, it was submitted that the SPA is a sham.

Findings Of The Court

[8] The fact that the plaintiff and the defendant executed the SPA is not disputed. The SPA is for the sale and purchase of the defendant's piece of land together with a semi-detached house erected thereon. According to the SPA, the defendant has acknowledged receipt of the sum of RM240,000 from the plaintiff by way of deposit and part-payment towards account of the purchase price on the execution of the SPA. Subsequent thereto the plaintiff applied for a housing loan from Public Bank Bhd for RM200,000 to finance the purchase of the said property. In the meantime, on 28 November 1998 the defendant entered a private

caveat on the said property. Consequently, the SPA could not be completed and hence the plaintiff's claim against the defendant. At the conclusion of the defence case learned counsel for the plaintiff informed the court that the plaintiff was abandoning the prayer for specific performance as the said property is now registered in the name of the defendant's wife.

[9] The issues to be determined are as follows:

(i) Whether there is any separate oral agreement between the plaintiff and the defendant on which the SPA is silent?

(ii) If so, whether the collateral agreement relates to any matter which is not inconsistent with the SPA?

(iii) If not, whether the defendant committed any breach of the SPA?

[10] The defendant has admitted that he signed the SPA. The defendant has also admitted to the fact that the plaintiff had applied for a bank loan to finance the purchase of the said property. However, according to the defendant, the plaintiff was to give him RM80,000 from the loan sum to enable him to complete the reconstruction of the said property. At the same time, the defendant contends that he was to pay the bank loan. The defendant also said in his evidence in chief that as soon as he had enough money he would redeem the said property and the plaintiff was to transfer the said property back to him. This admission on the part of the defendant shows that the SPA was to all intents and purposes a genuine SPA. The plaintiff had already applied for a housing loan of RM200,000. The title in the said property was to be transferred to the plaintiff. There is no evidence whatsoever of any duress or pressure put on the defendant to sign the SPA. The defendant signed the SPA voluntarily. He understood the terms and conditions of the SPA. The defendant's contention that the SPA is a sham is not supported by any evidence at all. The court accordingly finds that the SPA is a valid and enforceable agreement which has been duly proved according to s. 91 of the Evidence Act 1950.

[11] As a general rule, once a document has been produced to prove its contents, as has been done in the present case, evidence of any oral agreement to contradict, vary, add to or subtract from its terms are inadmissible. There are, however, a number of

exceptions to this general rule. The exceptions to the general rule are set out in the six provisos to s. 92 of the Evidence Act 1950. Section 92 of the Evidence Act is as follows:

92. Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:

(a) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) The existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

A (f) Any fact may be proved which shows in what manner the language of a document is related to existing facts.

[12] In this case the defendant's allegations are clearly intended to contradict, vary and negate the terms and conditions of the SPA. Learned counsel for the defence submitted at length on the defendant's allegations which are at variance with the SPA as a whole. In the first place, the defendant agreed that he signed the SPA. The defendant admitted that he received RM160,000 from the plaintiff. The defendant said that he understands the contents of the SPA and that the amount stated therein in s. 7 of the Schedule is RM240,000. He also said that he understands the meaning of the phrase "the receipt of which sum the Vendor hereby acknowledges" in cl. 1 of the SPA. There is no evidence that the execution of the SPA was procured by fraud or that the SPA was induced by fraudulent misrepresentation (see *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 (FC); *Siah v. Tengku Nong* [1964] MLJ 43 (FC)). The defendant admitted to signing the SPA voluntarily. Therefore, there is no question of the defendant signing the SPA under duress. The facts as adduced by the defendant's evidence in this regard would not invalidate the SPA under proviso (a) to s. 92 of the Evidence Act.

[13] Secondly, the defendant's allegations do not touch on matters which the SPA is silent and which is not inconsistent with its terms. The SPA is a comprehensive agreement embodying all the terms and conditions usual in a sale and purchase transaction involving land and a house. In this respect, the court has also regarded the degree of formality of the SPA. The SPA is a written agreement drawn up by a firm of solicitors. It contains three paragraphs of recitals and 21 clauses of terms and conditions. In addition, it incorporates a Schedule comprising of 15 sections of additional details. All in all, the SPA is a document made up of nine pages. The more formal the written document is, the more suspicious the court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to set up a collateral contract (see *Gek Lau Choon Theatrical Company v. Hu Kiang Yan* [1937] MLJ 222 (HC)). The defendant's allegation in this regard, is that the plaintiff granted to him an option to buy back the said property at the same purchase price. That agreement is contained in the document exh. D11. The plaintiff did not deny issuing D11 to the

defendant. The plaintiff said that it was signed after the SPA was executed. On its face D11 is a letter from the plaintiff to the defendant giving the defendant a buy-back option. It was created subsequent to the execution of the SPA. D11 is not an oral agreement. It is not and cannot be said to be a separate oral agreement as to which the SPA is silent. The defendant's reliance on D11 to support his allegation of a separate oral agreement is of no avail.

[14] Thirdly, there is the defendant's allegations of an oral agreement that the plaintiff would pay him RM80,000 from the housing loan. The defendant alleges that since the loan amount was inadequate for that purpose he decided to lodge a private caveat on the said property. Can it be said that this so-called oral agreement constituted a condition precedent so that the SPA does not take effect until the RM80,000 is paid to the defendant. The scope of proviso (c) to s. 92 is clearly confined to evidence of a condition precedent to a written contract. A condition precedent to an agreement is one where the parties have agreed that the written contract does not take effect until the fulfilment of a certain condition (see *Latham v. Credit Suisse First Boston* [2000] SLR 693 (CA)). In the present case in order for the plaintiff to apply for and to obtain a housing loan from the bank, the plaintiff must have entered into the SPA. This the parties have done. It is also the defendant's evidence in chief that (i) the plaintiff suggested that they go through the SPA, (ii) the plaintiff would take a loan from a bank so that she could receive the amount the plaintiff loaned to the defendant, and (iii) the defendant would subsequently pay off the bank loan. The defendant also said that he was to get RM80,000 from the plaintiff to complete the reconstruction of the said property. As soon as he had enough money he was to redeem the said property and the plaintiff was to transfer back the said property to him. There is, on the facts, no condition precedent to be fulfilled before the SPA takes effect. The RM80,000 payment, the redemption of the said property and the transfer back of the said property takes effect after the execution of the SPA. In fact, the defendant's allegations hinges on the validity of the SPA and not otherwise.

[15] Fourthly, there is no evidence of any distinct subsequent oral agreement to rescind or modify the SPA. The defendant's allegations pertain to the arrangement that was agreed with the plaintiff prior to the execution of the SPA. For the reasons

A adumbrated above, there is nothing to indicate that the facts in this case fall within any of the circumstances described in the provisos to s. 92. Accordingly, the defendant's evidence relating to the purported collateral agreement are inadmissible.

B **[16]** For the foregoing reasons the court finds that the SPA is not a sham agreement. The SPA is a valid and binding contract for the sale and purchase of the said property. It was executed by both the plaintiff and the defendant on 2 October 1998. The defendant has acknowledged receipt of a sum of RM240,000 as
C deposit and part payment of the purchase price. The plaintiff applied for and obtained a housing loan of RM200,000. However, on 28 November 1998 the defendant lodged a private caveat on the said property thereby preventing the plaintiff from completing the SPA. The defendant's aforesaid act constituted a breach of
D the SPA on his part. In the premises, the plaintiff's claim is allowed in prayers (ii)(a), (b) and (iii).

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